No. 92-662

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

CEDAR COAL COMPANY,

Petitioner,

vs.

JEWELL SHUFF, SURVIVOR OF PAUL SHUFF,

Respondent,

-and-

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JEWELL SHUFF

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QUESTION PRESENTED

1. Whether a petition for a writ of certiorari should be refused when there is a consistency of decisions within the United States Courts of Appeals?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Respondent hereby incorporates by reference the List of Parties and Rule 29.1 Statement filed by the petitioner in the original petition for a writ of certiorari.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties and Rule 29.1 Statement	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	2
Statutes and Regulations Involved	2
Statement of the Case	2
Summary of Argument	5
Reasons for Denying the Writ	5
I. The opinion below is consistent with the remedial purposes of the statute, the legislative history of the Black Lung Benefits Act, and interpreting regulations of the Department of Labor	6
Conclusion	8
Appendix	1a

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Lukosevicz v. Director, OWCP, 888 F.2d 1001 (3d Cir. 1989) 4, 5

Peabody Coal Co. v. Director, OWCP, 1992 U. S. Lexis 20199 (1992) 5

Statute Cited:

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 et seq. 5, 6, 7, 8

Rule Cited:

Supreme Court Rule 10 5

Other Authorities Cited:

20 C.F.R. § 718.201 3

20 C.F.R. § 718.202(a)(4) 3

20 C.F.R. § 718.205 6

48 Fed. Reg. 24276-88 (1983) 7

127 Cong. Rec. 31,745-76 (1981) 6

Contents

	Page
127 Cong. Rec. 31,747	6
127 Cong. Rec. 31,976-77 (1981)	6
127 Cong. Rec. 31,978	6

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Counsel for the respondent accepts the petitioner's recitation of the opinions below upon which the original petition is sought.

STATEMENT OF JURISDICTION

Counsel for the respondent accepts the petitioner's recitation of the jurisdiction of the underlying tribunals, and this Court.

STATUTES AND REGULATIONS INVOLVED

Counsel for the respondent accepts the petitioner's recitation of the statutes and regulations involved in this claim.

STATEMENT OF THE CASE

The decedent, Paul Shuff, was an underground coal miner for approximately seventeen years. He worked for Eastern Associated Coal Corporation as an underground coal miner from April, 1951, until September, 1952. He again worked underground for Eastern from September, 1955, through May, 1957. Thereafter, Mr. Shuff worked for various coal companies in the southern West Virginia area from December, 1969, until May, 1983. His last cumulative period of one year coal mine employment was with Cedar Coal Company, where he worked as a roof bolter. He continued to work at Cedar Coal Company until a few months prior to his death. The Administrative Law Judge found that Mr. Shuff had at least sixteen years of qualifying experience.

Sometime in 1983, Mr. Shuff was discovered to suffer from cancer of the pancreas. He left his employment, and subsequently filed for total disability benefits in April, 1983. These benefits were awarded, and are not the subject of this appeal. Mr. Shuff died on July 28, 1983. His widow, Jewell Shuff, filed a claim for survivor's benefits on August 18, 1983.

Evidence produced at the hearing established that Mr. Shuff had developed pneumonia immediately prior to his death.

In addition to the evidence adduced at the hearing which established that Mr. Shuff was totally disabled due to pneumoconiosis, substantial evidence was presented concerning the relationship between his pneumonia, his black lung disease, and his death. This evidence included review of autopsy results, and testimony from several physicians, including Mr. Shuff's treating physician.

Evidence was submitted by Dr. Shim, Dr. Walker, Dr. Rodman, Dr. Crisalli, Dr. Hansbarger, and Dr. Zaldivar which variously concluded that Mr. Shuff had a minimal to significant impairment, and which all concluded that the pneumoconiosis did not substantially cause or contribute to Mr. Shuff's death.

Conversely, evidence was introduced by Dr. Cinco, Dr. Rasmussen, and Dr. Lee, who was Mr. Shuff's treating physician, indicating that Mr. Shuff did in fact suffer from substantial pulmonary impairment, and that Mr. Schuff's pneumoconiosis was a substantially contributing cause of Mr. Shuff's death from pneumonia.

In assessing the medical evidence, including the medical testimony, x-ray results, and pulmonary function tests, the Administrative Law Judge found that the weight of the evidence showed that Mr. Shuff was totally disabled by pneumoconiosis which resulted from his qualifying employment.

The Administrative Law Judge found pneumoconiosis by autopsy and as defined in 20 C.F.R. §§ 718.201 and 202(a)(4). He also found that the miner was totally disabled by pneumoconiosis. With regard to the survivor's claim, the Administrative Law Judge found that the miner died:

> as a result of cancer of the pancreas with extensive metastases, *although the immediate*

> *or terminal cause of death was pneumonia.* There is no evidence that the pneumoconiosis was a direct cause of death or the death resulted from complications of pneumoconiosis. Hence the central question in this case is whether pneumoconiosis was a substantially contributing cause of death because *there is evidence that pneumoconiosis contributed to death insofar as it made the miner more susceptible to pneumonia, which was the immediate cause of death.*[1]

The Administrative Law Judge also found that "all indication in this record is that the contributing relationship between pneumoconiosis and the miner's death in this cause is that [it] increased the miner's susceptibility to pneumonia."[2]

Using this evidence to assess the survivor's claim, the Administrative Law Judge found that the terminal cause of Mr. Shuff's death was pneumonia. He further found that the pneumoconiosis may have hastened his death. This finding was not controverted by the respondent, and was not rejected by the Benefits Review Board.

The Fourth Circuit, in an opinion written by Chief Judge Ervin, affirmed and adopted the interpretation of the applicable regulations by the Director, Office of Workers' Compensation Programs, United States Department of Labor (hereinafter, "the Director"), that pneumoconiosis substantially contributes to death if it serves to hasten death in any way. The court cited with approval a similar opinion by the Third Circuit in *Lukosevicz v. Director,*

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1. Decision and Order at p. 22 (emphasis supplied).

2. Decision and Order at p. 24.

OWCP, 888 F.2d 1001 (3d Cir. 1989), in which the legislative history of the Black Lung Benefits Act and the resultant regulations were analyzed and the same conclusion reached. Importantly, the Fourth Circuit remanded the case to the Benefits Review Board with instructions to vacate its order, and to remand the case to the Administrative Law Judge for a definitive finding as to whether the pneumoconiosis actually hastened Mr. Shuff's death.

SUMMARY OF ARGUMENT

The petition for a writ should be refused because of the consistency of decisions in the United States Court of Appeals for the Fourth, Third and Seventh Circuits, and because the standard is consistent with the remedial purposes of the Black Lung Act and the Director's interpretative regulations. The petition for a writ should further be refused because the opinions below are consistent with the Director's interpretations of the Act and legislative history. In such cases, these interpretations are entitled to judicial deference.

REASONS FOR DENYING THE WRIT

A review on a writ of certiorari is not a matter of right, but judicial discretion. Sup. Ct. R. 10. There are no special nor important reasons for granting the petition. The decision of the United States Court of Appeals for the Fourth Circuit below is not in conflict with the decision of another United States Court of Appeals. To the contrary, the decision below is in complete agreement with the similar decisions in *Lukosevicz v. Director*, 888 F.2d 1001 (3d Cir. 1989), and *Peabody Coal Co. v. Director, OWCP*, 1992 U. S. App. Lexis 20199, p. 17, August 17, 1992. These three Circuit Courts have each elucidated a standard consistent with the Act and with congressional intent. Further, the Fourth Circuit's remand of this case for determination in light of the adopted standard indicates that the standard is not as

insurmountable as petitioner suggests.

I.

THE OPINION BELOW IS CONSISTENT WITH THE REMEDIAL PURPOSES OF THE STATUTE, THE LEGISLATIVE HISTORY OF THE BLACK LUNG BENEFITS ACT, AND INTERPRETING REGULATIONS OF THE DEPARTMENT OF LABOR.

In the 1981 amendments to the Black Lung Benefits Act, Congress acted to tighten eligibility requirements for survivor's benefits. Specifically, Congress attempted to stop the award of survivor's benefits where death had been due to circumstances unrelated to the miner's pneumoconiosis.[3] The congressional history further emphasizes that Congress intended to avoid an award of benefits where the cause of death was totally unrelated to the miner's pneumoconiosis, such as fatal accidents.[4] Interestingly, in floor discussions of the applicability of the revised statute, records of both the House and Senate debates cite as an example of entitlement where the principal cause of death is pneumonia, and that pneumoconiosis may be a substantial contributing cause.[5]

In enacting regulations pursuant to the new statutory language, the Department of Labor promulgated the current language in § 718.205. In comments to the rule, the Department emphasized that benefits were not payable where the cause of death is unrelated to pneumoconiosis. However, the Department

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3. 127 Cong. Rec. 31,977 (1981).

4. 127 Cong. Rec. 31,745-76, 31,976-77 (1981).

5. *Id.* at 31,747, 31,978.

further stated that pneumoconiosis need not be the "principal, sole, primary or proximate cause of the miner's death in order for the survivor's claim to be compensable." [6]

In the instant case, the uncontroverted evidence is that Mr. Shuff, although dying of cancer, died of pneumonia. It is further uncontroverted that Mr. Shuff's pneumoconiosis was a substantial factor in causing his death from pneumonia. To argue that Mr. Shuff was going to die from his pancreatic cancer misses the point. The Black Lung Benefits Act clearly awards benefits in any circumstance where there is a direct relationship between the pneumoconiosis and the miner's death. The medical evidence and the Administrative Law Judge's findings support the relationship between Mr. Shuff's penumonia and his black lung disease.

The Fourth Circuit affirmed the standard adopted by the Director as being consistent with the remedial purposes of the Black Lung Benefits Act. Importantly, the court found the medical evidence conflicting, and the finding of the Administrative Law Judge to be inconclusive. Hence the case was remanded for a definitive finding as to whether the pneumoconiosis actually hastened Mr. Shuff's death.

It is entirely possible upon remand that the Administrative Law Judge will find that the medical evidence does not establish entitlement to survivor's benefits. Thus, the standard adopted by three Circuit Courts of Appeals cannot be said to be "novel and untenable," as urged in the concluding section of the petition.

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6. 48 Fed. Reg. 24,276-88 (1983).

CONCLUSION

Based upon legislative history and the remedial purpose of the Black Lung Benefits Act, the Director issued interpretive regulations which are the subject of this claim. It is axiomatic that such interpretations are entitled to judicial deference unless plainly wrong. Three Circuit Courts of Appeals have ruled that the standard is correct. Therefore, the petition for writ should be denied.

Respectfully submitted,

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APPENDIX

Respondent hereby incorporates by reference the Appendix filed by the petitioner in the original petition for a writ of certiorari.